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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1957

THE NEW YORK CENTRAL RAILROAD COMPANY,
APPELLANT

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

ERIE RAILROAD COMPANY, APPELLANT

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MEMORANDUM FOR APPELLEES UNITED STATES AND INTERSTATE COMMERCE COMMISSION IN SUPPORT OF STATEMENTS AS TO JURISDICTION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 838

THE NEW YORK CENTRAL RAILROAD COMPANY, APPELLANT

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

No. 918

ERIE RAILROAD COMPANY, APPELLANT

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MEMORANDUM FOR APPELLEES UNITED STATES AND INTERSTATE COMMERCE COMMISSION IN SUPPORT OF STATEMENTS AS TO JURISDICTION [1]

These appeals present the important question whether the Interstate Commerce Commission has

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[1] The United States and the Interstate Commerce Commission decided to appeal in these cases, but through oversight their joint notice of appeal was filed out of time. They are therefore appearing as appellees in relation to the appeals taken by the railroad companies.

jurisdiction to control the abandonment by a railroad of a passenger ferry operating entirely in interstate commerce. The District Court held that the Commission lacked power under Section 1 (18) of the Interstate Commerce Act (49 U. S. C. 1 (18)) to authorize the New York Central Railroad Company to abandon its two passenger ferry lines across the Hudson River between Weehawken, N. J., and 42nd and Cortlandt Streets in New York City, and to authorize the Erie Railroad Company to abandon its trans-Hudson passenger ferry line between Jersey City, N. J., and Chambers Street in New York City. In addition to the three trans-Hudson passenger ferry lines involved in these cases, two passenger ferry lines are operated across the Hudson River by the Lackawanna and Jersey Central Railroads, respectively. Thus, the decisions below affect the Commission's jurisdiction under Section 1 (18) with respect to five railroad passenger ferry lines across the Hudson River between New York City and New Jersey.

Section 1 (18) provides that without the prior approval of the Commission, no railroad "shall abandon all or any portion of a line of railroad, or the operation thereof."[2]

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[2] The sweep of Section 1 (18) is shown by the provision of Section 1 (22) that—

> The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Section 1 (3) provides that "The term 'railroad' as used in this part shall include all * * * ferries used by or operated in connection with any railroad." The Commission and the courts have long held that the Commission's power under Section 1 (18) does not extend to a partial discontinuance of service—as distinguished from a total abandonment or cessation of all operations of a line or portion thereof. See the cases cited in the lower court's opinion, J. St. App., No. 838, A–5 and A–6.

New York Central operates two passenger ferry lines between Weehawken, N. J., and two points in New York City, and transports freight between Weehawken and other points in New York City. Erie operates one passenger ferry line between Jersey City, New Jersey and Chambers Street in New York City and transports freight between Jersey City and other points in New York City. It is undisputed that the passenger ferry services are performed with separate vessels, on different routes, and to separate terminals on the New York side. The Commission held that these passenger ferry lines constituted lines of railroad entirely separate from the freight operations across the river. Accordingly, it concluded that it had jurisdiction under Section 1 (18) to authorize abandonment of those passenger ferry lines. In setting aside the Commission's orders, the District Court held, to the contrary, that each railroad's passenger and freight operations together constituted a single "line of railroad" within the meaning of Section 1 (18). It concluded, therefore, that cessation of the passenger

ferries involved only a partial discontinuance of service not subject to Section 1 (18).

We contend that the court below has erroneously construed Section 1 (18). The Commission long ago held that it has jurisdiction over a proposed relocation of tracks between two points, *Construction and Abandonment by G. N. Ry.*, 124 I. C. C. 685 (1927), and over the abandonment of one of two rail lines between two points. *Colorado & S. Ry. Co. Abandonment*, 180 I. C. C. 735 (1932). Similarly, this Court, in *Railroad Commission of California* v. *Southern Pacific Co.*, 264 U. S. 331, sustained the jurisdiction of the Commission under Section 1 (18) to authorize both an abandonment and extension of lines of railroad in Los Angeles incident to a relocation of tracks for the construction of a new union terminal. See also *A. T. & S. F. Ry. Co.* v. *Railroad Commission of California*, 283 U. S. 380, 390, 393. Also, in *Yonkers* v. *United States*, 320 U. S. 685, 323 U. S. 675, where this Court upheld the Commission's power to authorize New York Central to abandon a line of track used only for passenger service between New York City and Yonkers, it was not even suggested that the fact that the railroad's main line would continue to operate between those points deprived the Commission of power under Section 1 (18) to authorize abandonment of the former line.

Moreover, in prior cases, the Commission, acting under Section 1 (18), authorized the abandonment of four railroad passenger ferry lines across the Hudson River where, as here, each of the railroads involved

continued to operate other passenger or freight ferry lines between New Jersey and New York City. *Central R. Co. of N. J. Trustees Ferry Abandonment,* 249 I. C. C. 269 (1941) (Jersey City to W. 23rd Street); *Erie R. Co. Ferry Abandonment,* 252 I. C. C. 659 (1942) (Jersey City to W. 23rd Street); *Hoboken Ferry Co. Abandonment,* 267 I. C. C. 51 (1946) (Hoboken to W. 23rd Street), affirmed in unreported opinion of a three-judge court in *West 23rd Street Ferry Assoc., Inc.* v. *The Hoboken Ferry Co., et al.* (Civil Action 39–370, S. D. N. Y., April 18, 1947); *Delaware, Lackawanna & Western R. Co. Ferry Abandonment,* 290 I. C. C. 809 (1954) (Hoboken to Christopher Street), affirmed in *Board of Public Utilities Commissioners of New Jersey* v. *United States,* 132 F. Supp. 379 (D. N. J.). In the cited proceedings before the Commission and the courts, neither the New Jersey Commission nor any other protestant raised the jurisdictional question posed by the instant case.

In brief, both the prior administrative and judicial construction of Section 1 (18) suggest, contrary to the decision below, that where for geographical or other reasons a railroad operates separate and distinct passenger ferry lines across the Hudson River, each is a separate line of railroad for the purposes of the abandonment provisions of Section 1 (18).

Moreover, the decision below is inconsistent with the broad purpose of the Act and the National Transportation Policy to develop and maintain a healthy and efficient transportation system. As this Court stated in discussing the scope of Section 1 (18) in *Piedmont & Northern Ry.* v. *I. C. C.,* 286 U. S. 299,

311: "the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress."

The financial problems of the American railroads, arising in considerable part out of heavy losses on passenger service, are a matter of common knowledge. The instant cases illustrate that railroad passenger ferry operations can contribute substantially to such deficits. Thus, the Commission found that in each of the years 1952, 1953, and 1954, New York Central's net loss on the two ferry lines here involved exceeded $1,000,000. The current significance of such deficits from the ferry operations can be seen by comparing it with New York Central's total net income in 1957 of $8,423,078. Erie's passenger ferry losses bear a similar significant relationship to that carrier's total net income.

Moreover, it appears that the court below assumed that if the Interstate Commerce Commission may not control the abandonment of railroad ferry lines across the Hudson River, the States of New York and New Jersey can do so. But this assumption is highly doubtful in view of *New York Central Railroad* v. *Hudson County*, 227 U. S. 248. There this Court, in holding invalid a local New Jersey ordinance purporting to regulate passenger fares on New York Central's trans-Hudson ferries, stated (p. 264):

> * * * But as all the business of the ferries between the two States was interstate commerce

> within the power of Congress to control and subject in any event to regulation by the State as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the State. We think the argument by which it is sought to limit the operation of the act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from State to State is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested. [Cf. *Chicago, B. & Q. R. Co.* v. *Illinois Commerce Commission,* 82 F. Supp. 368, 376 (N. D. Ill.).]

The decisions below thus could well result in permitting the railroads to discontinue at will their passenger ferry lines between New York and New Jersey. While the question of the states' power is not now before the Court, it is pertinent that the decision below, if unreversed, can create such a gap in regulation. Since it is incredible that Congress intended to exempt from all public control the discontinuance of what was a vital link in rail transportation in 1920 (when Section 1 (18) was enacted), such a conclusion should not be reached unless there is no escape from it. *Cleveland, C. C. & St. L. Ry. Co.* v. *United States,* 275 U. S. 404, 412.

The question presented by these appeals is of considerable importance in the administration of the Interstate Commerce Act, and should be decided by this Court. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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